80-281

Docket No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OKC CORP.,

Petitioner,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 22, 1980

Questions Presented For Review

1. Whether the detailed review and analysis by a federal agency of the contents of a wrongfully taken attorney-client privileged document paralleling the circumstances of *Walter* v. *United States,* 48 U.S.L.W. 4807 (U.S., June 20, 1980), without first obtaining a warrant, constitutes an illegal search and/or seizure in violation of the Fourth Amendment to the United States Constitution?

2. Whether the use by a federal agency of the privileged matter that is the fruit of that search and seizure violates the Fifth and Sixth Amendments to the United States Constitution?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Docket No.

OKC CORP.,

Petitioner,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, OKC Corp. ("OKC"), petitioning for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, respectfully shows:

Decisions Below

The decision of the United States Court of Appeals for the Fifth Circuit is reported as *OKC Corp.* v. *Williams,* 614 F.2d 58, *reh. denied,* 617 F.2d 1207 (5th Cir. 1980). Three of the underlying decisions of the United States District Court for the Northern District of Texas are reported as *OKC Corp.* v. *Williams,* 461 F. Supp. 540 (1978); [1979 Transfer Binder] CCH FED. SEC. L. REP. ¶96,773; and [1979 Transfer Binder] CCH FED. SEC. L. REP. ¶96,790 (N.D. Tex. 1979). Two opinions of the district court, dated August 29, 1978, and February 7, 1979, are unreported. Copies of all of these opinions are appended.

Basis of Jurisdiction

This Court has jurisdiction under 28 U.S.C. §1254. The judgment sought to be reviewed was entered by the Clerk of the United States Court of Appeals for the Fifth Circuit on March 19, 1980. A timely filed petition for rehearing was denied on May 30, 1980. This petition for a writ of certiorari is timely filed within the prescribed ninety day period.

Constitutional Provisions Involved

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

On February 28, 1978, two enforcement officials of the Securities & Exchange Commission ("SEC"), one a lawyer and the other an investigator, received a three volume package from two "informants". That package was a copy of a complete legal report prepared by a distinguished Dallas law firm for a committee of OKC's board of directors.

Emblazoned on the cover of the report was the legend **"PRIVILEGED AND CONFIDENTIAL—NOT FOR DISTRIBUTION."** The cover page made it clear that this was a report by counsel. That firm, Locke Purnell Boren Laney & Neely, P.C., was indisputedly known to the SEC attorney who received the package. As he testified, the legend merely whetted his appetite to read the contents of the report.

The SEC staffers acknowledged that never before had they been given a document like this under such circumstances. The report was the culmination of a review, by the legal counsel to a board committee, of OKC's practices in various business fields, including petroleum refining and sales. It unquestionably contained sensitive, private information.

There is absolutely no doubt that no one in authority at OKC approved the release of this report to the SEC. It was purloined by a company tax manager, who purportedly was to do a tax analysis of one part of it for a director, and was then given by him to one of the informants. It was then taken to the Department of Energy ("DOE"), who photocopied it, with the informant's accomplice (a company credit manager) then delivering a DOE-made copy to the SEC.

Without obtaining a warrant, SEC staffers then reviewed the report, analyzed its contents in detail, and used it to obtain a Formal Order of Investigation from their Washington superiors. Purportedly utilizing the report as a justification in subsequent administrative subpoena proceedings, those agents even tried to file the report on the public record of various federal courts. The courts concerned sealed the copies of the report, and OKC brought this action to recover the report and enjoin its further distribution and use.

The facts remarkably parallel *Walter* v. *United States*, Nos. 79-67 and 79-148 (U.S., opinion filed June 20, 1980). Here, though, there is a factor which made the conduct of the federal agents even more egregious. The matter that was read was a privileged document.

Proceedings in the District Court

On August 25, 1978, the SEC conceded that the report was a privileged document and was the sole basis for its investigation of OKC. These facts were so recited in an order entered by the district court on August 29, 1978, and use or distribution of the report was enjoined. The case then entered "Phase I", designed to determine whether or not the SEC could use the report, despite its privileged status.*

A further order was entered on November 22, 1978. Over OKC's objection, the district court ruled that, only if "a government official knew or should have known at the time of its occurrence" that the informant had taken the report, would the SEC's conduct violate the Fourth Amendment. 461 F. Supp. at 551. At an argument on January 31, 1979,

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* Federal jurisdiction was predicated on 28 U.S.C. §§1331, 1337 and 1361, as well as 5 U.S.C. §§552, 701 and 702, and 15 U.S.C. §78aa.

the district court then advanced a further theory as to the legality of searches and seizures. Only, it suggested, if there was no volitional act by the initial recipient in the chain of delivery from the company to the SEC, could there have been a Fourth Amendment violation. In short, the report had to be extracted by the government against the actual will of its custodian for there to be a search or seizure.

On Saturday, February 3, 1979, the district court entered an order to that effect and, for the first time released the report. [1979 Transfer Binder] CCH FED. SEC. L. REP. ¶96,773. On the afternoon of February 7, 1979, the district court, in response to an OKC motion, then reconsidered its order and stayed the case. All further use of the report was restrained.

On February 22, 1979, the lower court issued yet another order. [1979 Transfer Binder] CCH FED. SEC. L. REP. ¶96,790. Acknowledging that its earlier "holding that a corporate employee having no more than mere custodial possession of a document may voluntarily hand it over to the government without running afoul of the fourth amendment may sweep too broadly", *id.* at 95,107, the court then granted summary judgment as to Phase I on what it called "two other and independent grounds", *id.* at 95,108.

These grounds, according to the lower court, were "that no genuine issues of material fact existed [1] as to the SEC's participation in the obtaining of the report or [2] as to a plausible link between the DOE and the SEC." (*Id.*) Without so much as a further word about the report's privileged status, or the propriety of the SEC's independent search and seizure of the report, the district court granted summary judgment as to Phase I.

Proceedings in the Court of Appeals

On appeal, OKC argued for reversal contending, among other things, that: (1) the SEC's review and analysis of the privileged report constituted an illegal search and seizure, irrespective of any lack of federal involvement in the informants' procuring of the report; (2) the SEC could not use a privileged document in any event; (3) the participation of the sister agency, the DOE, in the initial taking was attributable to the SEC (there is no *intra-sovereign* "silver platter" doctrine); and (4) there were questions of fact as to the SEC's own involvement in the taking.

As OKC argued to the district court, and later to the court of appeals, even if the SEC had no participation in the taking of the report, the SEC's conduct still violated the Fourth Amendment. The SEC staffers' acceptance of the acknowledged, privileged report, particularly when knowing they were not supposed to have it, was an illegal Fourth Amendment seizure. *E.g., Wilhelm* v. *Turner,* 431 F.2d 177, 180 (8th Cir. 1970), *cert. denied,* 401 U.S. 947 (1971). Reading the report in depth thereafter also constituted an illegal search. *Accord, United States* v. *Haes,* 551 F.2d 767, 771 (8th Cir. 1977). *See also United States* v. *Kelly,* 529 F.2d 1365 (8th Cir. 1976).

During the pendency of OKC's appeal, the Fifth Circuit rendered its decision in *United States* v. *Sanders,* 592 F.2d 788 (5th Cir. 1979), *rev'd sub nom.,* 48 U.S.L.W. 4807 (U.S., June 20, 1980). There, the court of appeals rejected the same kinds of arguments that OKC had been making as to independent SEC search and seizure violations.

The Court of Appeals then ruled here that, because the SEC did not participate in the procurement of the report, the district court should be affirmed. It thus sanctioned removal of the restraint on SEC possession and use of the report.

Reasons For Allowing the Writ

1. The Decision of the Courts Below Conflicts With a Decision of This Court

In *Walter* v. *United States,* 48 U.S.L.W. 4807 (U.S., June 20, 1980), *rev'g,* 592 F.2d 788, 597 F.2d 63 (5th Cir. 1979), this Court held that "[t]he fact that [federal] agents were lawfully in possession of the boxes of film did not give them authority to search their contents." *Id.* at 4809. Assuming the SEC's receipt of the report was lawful, the same is true here as to the contents of OKC's privileged report.

As Justice White wrote in his concurrence, the government's subsequent view of the contents in question "constituted an independent, governmental search that would have infringed petitioners' Fourth Amendment interests . . ." without regard to what private parties had done. *Id.* at 4811. The same is true here.

The doctrine of *Walter* v. *United States* is just as applicable to a federal invasion of the written communication between attorney and client, as it is to the printed matter in *Walter.* The Fifth Circuit's affirmation of the district court's decision cannot be reconciled with that doctrine.

2. The Decision Below Conflicts With Those of Other Courts and Presents Important Questions of Federal Law

The attorney-client relationship and the privileges afforded it are fundamental to the American legal system. Indeed, that relationship, and the role of counsel in our society, are among the most significant factors that distinguish our legal system from those of totalitarian states.

Here, OKC's report partakes of three kinds of privileges. *E.g., Diversified Industries, Inc.* v. *Meredith,* 572 F.2d 596 (8th Cir. 1978) (*en banc*) (attorney-client privilege); *General Counsel* v. *United States,* 599 F.2d 504 (2d Cir. 1979) (work-product privilege); *Keyes* v. *Lenoir Rhyne College,* 552 F.2d 579, 581 (4th Cir. 1977); *Banks* v. *Lockheed-Georgia Co.,* 53 F.R.D. 283, 285 (N.D. Ga. 1971) (critical self-investigation). These privileges apply unless all are intentionally waived, *International Business Machine Corp* v. *Sperry Rand Corp.,* 44 F.R.D. 10, 13 (D. Del. 1968); *Magida* v. *Continental Can Co.,* 12 F.R.D. 74 (S.D.N.Y. 1951), which must be done only by someone with actual authority. *See, e.g.,* Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 YALE L.J. 939, 985-86 (1956).

Long ago, in *Liggett* v. *Glenn,* 51 F. 381 (8th Cir. 1892), it was established that the receipt, through unauthorized means, of privileged material results in a continuation of the privileges, and necessitates suppression of the material. This conclusion was stated in words that merit repetition here:

> The principle forbidding its use is not adopted as a mere rule to professional conduct on part of the attorney. *It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. It will not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which do not involve the counsel in a breach of professional duty.* 51 F. at 396 (emphasis supplied).

The federal rule has since consistently been that one whose privileged materials are taken without authority can repossess them and prevent their use. *Accord,* SUP. CT. EVID.

STD. 503; *In re Grand Jury Proceedings,* 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977), *aff'd,* 570 F.2d 562 (6th Cir. 1978); *United States* v. *Mackey,* 405 F. Supp. 854, 857-58 (E.D.N.Y. 1975).

In *United States* v. *Mitchell,* 372 F. Supp. 1239 (S.D.N.Y.), *appeal dismissed sub nom., Stans* v. *Gagliardi,* 485 F.2d 1290 (2d Cir. 1973), for example, an attorney, Parkinson, who represented the defendant, Stans, in another proceeding, testified before a Grand Jury. Parkinson produced work product materials which he had prepared during his representation of Stans. A second Grand Jury, which ultimately returned an indictment against Stans, was later impaneled. Parkinson did not appear before this body. The prosecutors, however, used the work product material as the basis for questioning *another* witness before the second Grand Jury.

The District Court held that this derivative use of privileged material was improper:

> The decision to "volunteer" information of this nature rests with the client. Parkinson's erroneous conclusion that the information could not be withheld can in no way be imputed to Mr. Stans *nor can the "fruits" of that conclusion be used to the detriment of the defendant.* 372 F.Supp. at 1246 (emphasis supplied), *quoting In re Terkeltoub,* 256 F. Supp. 683, 684 (S.D.N.Y. 1966).

Accord, United States v. *Mancuso,* 378 F.2d 612, 618, *modified,* 387 F.2d 376 (4th Cir. 1967), *cert. denied,* 390 U.S. 955 (1968); *In re Terkeltoub,* 256 F. Supp. 683, 685 (S.D.N.Y. 1966).

In sanctioning a deviation from these principles, the Court of Appeals and the district court here have far de-

parted from the rules as enunciated by their sister courts. They have done so here in circumstances involving significant rights and which merit review by this Court.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Dated: August 22, 1980

Respectfully submitted,

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Appendices

APPENDIX "A"

DECISIONS OF THE COURT OF APPEALS IN THE CASE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1459

OKC CORP.,

Plaintiff-Appellant,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants-Appellees.

No. 79-1580

OKC CORP.,

Plaintiff-Appellant,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Indi-

vidually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(Decided March 19, 1980.)

Ford, Marrin, Esposito, Witmeyer & Bergman, Richard Burke Marrin, New York City, Robert A. Miller, Gen. Counsel, OKC Corp., G. Scott Damuth, Dallas, Tex., for plaintiff-appellant in 79-1459.

James H. Schropp, Asst. Gen. Counsel, Paul Gonson, Assoc. Gen. Counsel, S. E. C., Washington, D. C., for defendants-appellees in both cases.

Julie Allecta, John P. Sweeney, Attys., S. E. C., Washington, D.C., for defendants-appellees in 79-1459.

Arthur Mitchell, Dallas, Tex., John J. Witmeyer, New York City, for plaintiff-appellant in both cases.

Before GODBOLD, HILL and POLITZ, Circuit Judges.

GODBOLD, Circuit Judge:

This is a dispute over the use by the Securities and Exchange Commission of a report concerning internal affairs of a corporation prepared by a law firm at the request of the corporate board of directors.

In July 1977 members of the board of OKC, a publicly held company listed on the New York Stock Exchange, brought to the board allegations of mismanagement and improper use of corporate funds by the company's chief executive officer. The board appointed a committee to investigate, and the committee retained a Dallas, Texas law firm to assist in the investigation. The firm prepared and distributed to all members of the board a report marked "Privileged and Confidential—Not for Distribution." One director, however, turned his copy over to an employee of the company who permitted it to be circulated among other employees and former employees. A former employee made a copy of this copy available to the federal Department of Energy, which was investigating OKC's oil pricing and oil brokerage practices. Later another copy was given by an OKC employee to the SEC. After reviewing the report the Commission initiated an investigation of OKC.[1]

On August 15, 1978, OKC brought this suit against the SEC, the five members of the SEC, and employees of the Commission, seeking to enjoin the investigation and claiming $15 million damages from Commission employees. OKC asserted that the report was privileged, that the investigation was based on it, and that DOE and SEC had obtained the copies that came into their hands in violation of OKC's rights under the Fourth and Fifth Amendments to the Con-

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[1] Commenced by order entered March 27, 1978, *In the Matter of OKC Corp.*, authorizing the Commission's staff to investigate possible violations of the SEC Act of 1934 and Commission rules thereunder.

stitution. OKC asserted numerous other claims that we need not discuss. *See OKC* v. *Williams,* 461 F.Supp. 540 (N.D.Tex. 1978).[2] SEC agreed to hold up its investigation pending decision by the district court concerning the report.

In November 1978 the district court entered the order published at 461 F.Supp. 540. Many of OKC's claims were dismissed.[3] The court bifurcated the remainder of the case into Phase I, concerning the SEC's receipt of the report, and Phase II, the issues remaining alive after Phase I had been resolved. The parties proceeded with discovery that was massive in scope and included, as the court described it, "testimony from virtually any person in government in any manner connected to [the central] facts."

In an order entered February 3, 1979, *OKC Corp.* v. *Williams* (N.D.Tex.), the court, addressing the Fourth Amendment issues, granted partial summary judgment for the Commission on Phase I. In Part I of this order the court considered whether there had been a "private party taking" of the report in which the federal government so participated or was implicated that the intrusion violated OKC's Fourth Amendment rights. *See Lustig* v. *U.S.,* 338 U.S. 74 (1949); *Burdeau* v. *McDowell,* 256 U.S. 465 (1921); *U.S.* v. *Mekjian,* 505 F.2d 1320 (5th Cir. 1975). The court found that there had been no private party taking. In Part II of the February 3 order the court held that there was no issue of fact concerning either SEC participation in the alleged "taking" of the report or any SEC link with DOE that might taint the SEC with any involvement that DOE might have.

The Court, however, reconsidered the February 3 order and, on February 22, issued another order. *OKC Corp.* v.

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[2] This suit is only one aspect of litigation between OKC and the SEC in several courts.

[3] OKC has not appealed from this order.

Williams (N.D.Tex. 1979). It concluded that the constitutional issues implicated in Part I of the February 3 order had not been necessary to its decision and should be pretermitted. It reaffirmed Part II of the February 3 order and set out in more detail the underpinnings for its conclusion that there were no disputed material issues of fact concerning the SEC's participation in obtaining the report or a link between the SEC and DOE that tainted the delivery of the report to the SEC. It is this summary judgment issue, and this alone, that is before us for review.[4]

We agree with the district court that there were no genuine issues of disputed fact concerning SEC participation in the alleged private party taking, either directly or by linkage with DOE. In neither brief nor oral argument has OKC pointed to such fact issues.[5]

OKC makes an alternative contention that DOE obtained the report illegally and that even if the SEC was

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[4] The district court has not entered a certificate under Fed.R. Civ.P. 54(b). We conclude, however, that we have jurisdiction of this appeal under 28 U.S.C. § 1292(a)(1) (1976), because the order of February 3, as amended by the order of February 22, denied OKC's request for an injunction.

[5] On June 8, 1979, while this appeal was pending and before it was orally argued, the same district court decided an action brought by the SEC to enforce a subpoena against OKC. *SEC* v. *OKC Corp.*, 474 F.Supp. 1031 (N.D.Tex. 1979). In that proceeding OKC contended that its Fourth Amendment rights had been violated. The court held *inter alia*, that there was "no nexus whatsoever between the DOE's inducement [of an OKC employee to give DOE a copy of the report] and the SEC's eventual possession of the report." *Id.* at 1040. Rather, the court found, OKC employees decided on their own and without governmental solicitation to give a copy to SEC, and independently and without knowledge that SEC would receive a copy, the DOE employee convinced the OKC employees to supply his agency with a copy. *Id.* Notice of appeal was filed and that case is now pending in this court. *SEC* v. *OKC Corp.*, No. 79-2427 (5th Cir., filed June 14, 1979).

not involved the Commission may not use the report, on the ground that if there is an illegal seizure or taking by one agency of the federal government the fruits may not be used by any agency of the federal government.[6] The argument reaches beyond the partial summary judgment and is prematurely addressed to us. The February 23 order did not determine whether there had been a private party taking at all or merely use and disposition of the report by corporate personnel who were authorized (or at least not forbidden) to act as they did, nor did it reach any conclusions with respect to participation by DOE employees.

Because the procedural posture of this appeal is confusing, we summarize. The issue for decision is whether the partial summary judgment entered in Part II of the February 3 order and reaffirmed in the February 22 order was erroneously entered. We hold that it was not, because there were no genuine issues of disputed fact concerning SEC participation in the alleged private party taking, either directly or by linkage with DOE. We do not reach OKC's alternative contention that the exclusionary rule bars use of the report by the SEC even if the SEC did not participate directly or by linkage with DOE in DOE's obtaining a copy.

AFFIRMED.

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[6] This argument seeking to apply the exclusionary rule government-wide was made to the district court in the subpoena enforcement proceeding, n. 5, *supra*. There the court held that the facts of the case did not give rise to application of the exclusionary rule. 474 F. Supp. at 1040.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1459

OKC CORP.,

Plaintiff-Appellant,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants-Appellees.

No. 79-1580

OKC CORP.,

Plaintiff-Appellant,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Indi-

vidually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Decided May 30, 1980.)

Ford, Marrin, Esposito, Witmeyer & Bergman, Richard Burke Marrin, John J. Witmeyer, III, New York City, Arthur Mitchell, Gen. Counsel, OKC Corp., Robert A. Miller, G. Scott Damuth, Dallas, Tex., for plaintiff-appellant.

Michael J. Stewart, Regional Adm., S.E.C., Fort Worth, Tex., James H. Schropp, Asst. Gen. Counsel, Paul Gonson, Associate Gen. Counsel, Julie Allecta, John P. Sweeney, Attys., S.E.C., Washington, D.C., for defendants-appellees.

Before GODBOLD, HILL and POLITZ, Circuit Judges.

PER CURIAM:

OKC states that this court ignored its argument that, without regard to the manner in which the SEC secured possession of the report prepared by a law firm at the request of the corporate board, and for reasons based on constitutional and common law grounds, any use by the SEC of the report was impermissible because it was privileged. The district court mentioned this argument in its order of November 22, 1978, but this order was interlocutory in nature, and this appeal was not taken from it. All this court has before it is an appeal from a partial summary judgment that was narrowly restricted by the district court. This court has carefully confined itself to ruling on the matters presented in the appeal that arise from the partial summary judgment and has avoided ruling on issues not before us.

The petition for rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc is DENIED.

APPENDIX "B"

DECISIONS OF THE DISTRICT COURT IN THE CASE

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. CA-3-78-1021-G

OKC CORP.,

Plaintiff,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants.

ORDER

On August 25, 1978, the plaintiff and defendants, through their respective attorneys, appeared before the court for the purpose of having a pretrial conference with respect to the above captioned case, at which time the plaintiff

presented its Motion to Leave to Take Depositions and for Expedited Production of Documents and Application for Temporary Restraining Order and Protective Order, together with Affidavit in support thereof, and likewise called to the attention of the court its Motion for Preliminary Injunction and Supplementary Brief.

After considering the above matters and the representations of counsel, the court is of the opinion that this case presents a threshold question with respect to a "Report to Special Committee to OKC Corp. by Special Counsel, Locke, Purnell, Boren, Laney & Neely, a Professional Corporation". In this connection, the court has determined from counsel that there is no dispute with respect to the fact that such report enjoyed the protection of an attorney-client privilege in the hands of plaintiff corporation, that such report was obtained by the SEC from a yet unidentified person or persons under circumstances not yet disclosed, and that the SEC proceedings about which plaintiff complains have been instituted and conducted on the basis of such report rather than by virtue of any other information obtained independently from such report.

The court has therefore determined that the question of whether or not the report continued to enjoy the protection of the attorney-client privilege after being placed in the hands of the SEC is a threshold question which should be determined before further proceedings in this case.

At the informal conference the SEC advised that it would contend, *inter alia,* that the informant (or informants) had such a relationship with OKC that the circumstances of acquiring the confidential report resulted in a waiver of the attorney-client privilege. Counsel to the SEC (Fort Worth office) stated that it was in the inter-

est of the SEC to obtain a rapid decision regarding the use it may make of the confidential report and that it occurred with the procedures then proposed by the court and now expressed in this order. The court is informed that the Washington office of the SEC has since the informal conference concurred except insofar as phase I discovery would allow discovery of the informant's identity. To this extent this order has been agreed to by the parties.

The court is sensitive to the value in protecting the identity of informants to law enforcement agencies. The possibility of limiting discovery in such a way as to avoid disclosure of the informant's identity has been considered. Such a procedure would not be practicable here. Instead, the court has determined that the best procedure, consistent with all interests, is to allow interrogation of the informant, but confine the knowledge gained to a limited and identified group.

It is therefore ORDERED that:

1. Plaintiff is hereby granted leave to take depositions and have expedited production of documents concerning the manner, means, and other circumstances applicable to the taking and furnishing of the report to the SEC and the manner, means, and other circumstances applicable to the SEC's receipt, acceptance, and use of such report as the basis for its proceedings with respect to OKC Corp. In connection with such depositions and production of documents, plaintiff is authorized forthwith to take the depositions of Cecil Mathis and Benjamin Simms of the Fort Worth office of the SEC and to have discovery from them of the relevant documents applicable to the subject matters outlined above. Plaintiff is further authorized to take the deposition of the informant or informants who

furnished or who were involved with the furnishing of the above described report to the SEC, the identity of such person or persons to be furnished to the plaintiff at the time of the taking of the depositions of Messrs. Mathis and Simms, with the depositions of the informant(s) thereafter to be taken as expeditiously as possible.

2. Plaintiff is granted leave to take the depositions of and obtain production of documents from the following additional parties who are present or former officers, employees, or directors of OKC Corp., to wit: David Owenby, Robert L. Parker, Gary C. Adams, Kenneth Adams, Stephen Adams, Vernon Hiltibrand, and L. D. Thompson, as promptly as possible after the taking of the depositions of Messrs. Mathis and Simms, as well as the informant or informants described above.

3. Plaintiff is granted leave to take additional depositions and obtain further production of documents with respect to the threshold question concerning the report which is described above, to the extent that the foregoing depositions and discovery reveal the identity of additional persons having knowledge of such subject matter.

4. The limitations placed upon the scope of the depositions and documents to be furnished by SEC personnel during the initial phase of this case shall be without prejudice to the plaintiff's right to take additional deposition testimony and obtain additional discovery from the same and additional SEC personnel during the subsequent development of other aspects of the case.

5. The SEC proceedings being conducted pursuant to the SEC's Order Directing a Private Investigation in the Matter of OKC Corporation (sic) (1-4860), FW-1701 is

hereby temporarily stayed and each of the defendants is hereby temporarily restrained from taking any further action in connection with such proceedings, commencing any additional proceedings arising therefrom, or further prosecuting any of the separate legal actions heretofore commenced for the purpose of compelling compliance with certain subpoenas issued in connection with such investigation.

7. Each of the defendants is hereby temporarily restrained from communicating any information concerning the existence, status, or subject matter of its current proceedings to any person making or proposing any tender offer, merger, or other transaction affecting the stock or other securities of OKC Corp. and are further temporarily restrained from taking any futher informal or private actions with respect to any such tender offer, merger proposal, or other securities transactions except in good faith and in strict compliance with such statutory authority as the commission may lawfully possess and exercise with respect thereto.

8. All depositions in phase I discovery shall be taken solely in the presence of counsel for the various parties in these proceedings. The identity of the person or persons who furnished the report in question to the SEC shall be kept confidential by the attorneys and the court reporter and not be divulged either to the respective clients or to other persons without leave of the court pending the determination of the above described threshold question concerning the report and the court's issuance of further orders pursuant to such determination. All documents and transcripts of depositions from phase I discovery shall be held in confidence. The originals will be sealed and filed

with the clerk's office with appropriate indication of their confidential nature. The attorney for OKC will retain only one copy of a document or transcript produced in phase I of discovery.

9. The attorneys for the parties are instructed to proceed as expeditiously as possible to commence and complete the first phase of the deposition and discovery process which has been described herein. In the event that the parties will be unable to complete such depositions and discovery within ten (10) days from the date of this order, the attorneys are instructed to report such fact to the court in order that it may consider the extension of the temporary restraining and protective orders provided for in paragraphs 5 through 8 above.

10. The restraining and protective orders provided for above in paragraph 5 through 8 shall continue in force for a period of ten (10) days from the date of the entry of this order and for such additional period of time as may be provided for by such subsequent orders of extension which the court may hereafter render in order to permit the completion of the depositions and discovery applicable to the threshold question identified by the court herein.

PATRICK E. HIGGENBOTHAM
United States District Judge

August 29, 1978

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. CA-3-78-1021-G

OKC CORP.,

Plaintiff,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants.

MEMORANDUM ORDER

This is a clash between a New York Stock Exchange listed company and its principal regulator, the Securities Exchange Commission. In a self-policing effort, OKC employed outside legal counsel to gather information and give advice regarding a situation viewed as a potential problem

by its board of directors. Counsel prepared a report, the contents of which were to be held in confidence, but have fallen into the hands of the SEC. Thus the effort at self-regulation has failed and the potential problem has shifted in its focus. The core of this fight is the use by the SEC of this report.

Facts

In early 1978, the SEC obtained the report which the Dallas law firm of Locke, Purnell, Boren, Laney & Neely prepared for OKC. How this report came to the Commission is unclear. (McGinnis affidavit, August 15, 1978, p. 5; Mathis affidavit, September 5, 1978, p. 5; OKC memorandum, September 29, 1978, pp. 4-5; Mitchell affidavit, August 29, 1978, p. 4). When the SEC became aware of its existence, or of the internal OKC investigation is also contested. (SEC memorandum, September 25, 1978, pp. 2-9; OKC memorandum, September 29, 1978, pp. 5-7, 13.) In any event, on March 27, 1978, the Commission entered an order appointing certain of the individual defendants as officers of the Commission for the purposes of conducting a private investigation to determine whether OKC, Cloyce K. Box, chief executive officer and chairman of the board of OKC, and others have violated antifraud and filing provisions of the Securities Exchange Act of 1934. After the SEC inquiry was underway, OKC lodged with the Commission a motion to halt the investigation. OKC director John Kelsey, the First City National Bank of El Paso and OKC also filed motions to quash subpoenas duces tecum. On August 15 and 16, 1978, the Commission commenced in the United States District Courts for the Western and Northern Districts of Texas and the Northern District of Oklahoma actions to compel compliance with the subpoenas.

The Commission learned during the summer of 1978 that Ghaith Pharaon was contemplating a tender offer to purchase OKC common stock. Specifically how and when it learned is disputed. (SEC memorandum, September 25, 1978, p. 11; McGinnis affidavit, September 21, 1978, p. 4; OKC memorandum, September 29, 1978, pp. 11-12; Mitchell affidavit, August 29, 1978, pp. 5-7.) Officers of the Division of Enforcement scheduled a meeting with Pharaon's representatives in Washington, D.C. For reasons yet unresolved, the Commission staff advised Pharaon's representatives of the SEC investigation. Whether other matters were discussed with Pharaon is disputed. (Miller affidavit, September 28, 1978, p. 3, Exhibit B; Herlihy affidavit, pp. 6-7, and attached exhibit.)

In late June, 1978, OKC requested from the SEC's Freedom of Information Act officer all documents relating to the Commission's OKC investigation. The Commission extended through July 21, 1978, its time to respond and on July 20, 1978, refused the request. OKC filed no additional administrative requests.

On August 15, 1978, OKC filed with this court a lengthy complaint in which it charged that defendants are:

1. Conducting an investigation which allegedly is "without the jurisdiction of the Commission and flouts the will of Congress";

2. Conducting the investigation based upon a report allegedly covered by the attorney-client privilege and unlawfully obtained from OKC in violation of OKC's fourth and fifth amendment rights;

3. Conducting the investigation pursuant to the Commission's rules relating to investigations, 17 C.F.R. 203, which,

it is alleged, violate OKC's fifth amendment due process rights;

4. Allegedly intimidating witnesses and otherwise conducting the investigation in bad faith; and

5. Causing plaintiff, its officers, directors, agents, employees, shareholders, and customers irreparable injury.

In addition, OKC alleges:

1. That the SEC has violated the Privacy Act of 1974, 5 U.S.C. 552a(b) (hereinafter referred to as the Privacy Act), by providing to and receiving from various government agencies and other persons information relating to OKC;

2. That the defendants violated the Privacy Act, §§ 14(e) and 24(b) of the Securities Exchange Act of 1934, and OKC's fifth amendment rights by disclosing the existence and nature of the Commission's investigation to Pharaon's representatives and by requesting Pharaon not to proceed with the tender offer; and

3. That the defendants have conspired to violate the Freedom of Information Act, 5 U.S.C. 552 (hereinafter referred to as FOIA), as well as the Commission's rules relating thereto, by denying, without adequate grounds, OKC's FOIA request for all records relating to the investigation of OKC, all in violation of OKC's fifth amendment due process rights.

Based upon these allegations, OKC requested this court:

A. Temporarily and permanently to enjoin the Commission's investigation of OKC and enjoin SEC from commencing or recommending any proceeding based upon the

investigation, information derived from the investigation, or information upon which the investigation is based;

B. In the event that it denies A. above, order that the investigation be conducted under trial-like procedures, that the defendants stop conducting the SEC's investigation in furtherance of any investigation being conducted by the federal Department of Energy or any other agency, that the defendants cease intimidating witnesses in the investigation, and that certain witness testimony be suppressed;

C. Declare the Commission's order of investigation "unauthorized, invalid, and void" and declare the SEC's Rules Relating to Investigations unconstitutional;

D. Order the SEC to grant OKC's FOIA requests;

E. Order the defendants to surrender to OKC all reports, files, and other records of OKC, which, without the consent of OKC, are in the possession of the defendants, and enjoin the defendants from disclosing or using such reports, records, or files in or as the basis of any investigation or other proceeding;

F. Enjoin the defendants from disclosing to or receiving from any agency or person records of or records pertaining to OKC in violation of the Privacy Act, § 24(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78x(b), or 18 U.S.C. § 1905; and

G. Award the plaintiff $15,000,000 in damages.

Following an August 25, 1978, status conference with the parties, this court issued an order on August 29, 1978, which restrained the SEC's use of the Locke, Purnell report and ordered expedited discovery regarding "the circumstances applicable to the SEC's receipt, acceptance,

and use of such eport as the basis for its proceedings with respect to OKC Corp." The SEC conceded that it could not proceed if its use of the report was enjoined and all parties consented to the order to preserve the status quo.

The order enjoining use of the report pending completion of expedited discovery was premised on the concession of counsel that there was no dispute as to the privileged status of the report. It was then envisioned that this discovery could be completed in less than thirty days. On August 31, 1978, the parties scheduled depositions of two defendants for September 11, 1978. On September 5, 1978, however, the SEC's Washington office disavowed the concession and withdrew from the agreement negotiated by its Fort Worth, Texas, office and filed with the court an application for protective order, or, in the alternative, a motion for postponement for discovery.

On September 5, 1978, the court ordered the report sealed.

On September 6, 1978, the court held a status conference in which in an effort to expedite discovery it probed the scope of factual disputes by inquiring into possible stipulations of facts. The court inquired if the SEC contested OKC's claims that:

1. The Locke, Purnell report was subject to the attorney-client privilege in the hands of OKC;

2. OKC had not waived the attorney-client privilege; and

3. The motive of the persons who provided the report to the defendant is irrelevant to a determination of the claim that the SEC's use of the report must be barred.

The SEC asked for time to consider the proposed stipulations and agreed not to pursue its investigation in the

meantime. The SEC advised that it did contest those claims and on September 21, 1978, asked the court to continue the status quo pending resolution of a planned motion challenging the court's subject matter jurisdiction. The SEC then filed with this court on September 25, 1978, a 47-page memorandum, accompanied by lengthy affidavits and exhibits. On September 29, 1978, OKC submitted an equally voluminous response.

The SEC's Motion

The SEC's motion deals only briefly with jurisdiction. It actually represents an attempt to have this court dismiss each of OKC's claims on the merits. Several of its objections may be classified as Rule 12(b)(6) motions to dismiss for failure to state a claim on which relief can be granted. The bulk of its arguments, however, are motions for summary judgment. The SEC asserts that its recitation of events and affidavits resolve any fact questions presented in its summary judgment motions and argues that OKC has failed to prove its case. As discussed at length below, at this point in the case, summary judgment on many of these complaints is singularly inappropriate. *Littlejohn* v. *Shell Oil Company,* 456 F.2d 225, 229 (5th Cir. 1972), *cert. denied,* 414 U.S. 1116 (1973). Rule 56(f), Fed.R.Civ.P. permits the court to defer ruling on a motion for summary judgment and "to permit affidavits to be obtained or depositions to be taken or discovery to be had." Should this court grant the motions for summary judgment, it would deprive OKC of its right fully to present its own position.

The court remains of the opinion (as held in the first conference with counsel) that the case will proceed most effec-

tively in two phases—Phase I, the report, and Phase II, all other matters. It will conduct the proceeding in that sequence. This is logical because the SEC concedes that without use of the report, it cannot proceed. Moreover, there is little overlap in the discovery necessary to a resolution of this question and the remaining claims. This order, however, will address certain matters properly in Phase II. The court has chosen to do so at this time because their disposition may simplify the proceeding and enable the parties to concentrate their efforts on the remaining serious and complex issues.

Jurisdiction

Generally, unless it has exhausted prescribed administrative remedies, a party involved in an administrative proceeding is not entitled to judicial relief. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Frito-Lay, Inc.* v. *Federal Trade Commission*, 380 F.2d 8 (5th Cir. 1967). Complaints that an agency is violating either specific statutory language or constitutional rights, however, are excepted from this general rule. *Coca-Cola Company* v. *Federal Trade Commission*, 475 F.2d 299 (5th Cir. 1973), *cert. denied*, 414 U.S. 877 (1973); *see, e.g., Breen* v. *Selective Service Board*, 396 U.S. 460 (1970); *Leedom* v. *Kyne*, 358 U.S. 184 (1958). It is well settled that when a complaint is so drawn as to seek recovery directly under the constitution or laws of the United States, the federal court with rare exception must entertain the suit. *Bell* v. *Hood*, 327 U.S. 678, 681-82 (1945). Where, however, plaintiff's claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," the federal court must dismiss it for want of jurisdiction. *Id.*,

682-83. In *Coca-Cola Company* v. *Federal Trade Commission, supra,* the Fifth Circuit warned that a claim does not confer jurisdiction merely because it is framed in conclusory language of a denial of due process.

OKC complains that in obtaining and using the Locke, Purnell report, the SEC violated OKC's fourth and fifth amendment rights, and that in conducting the investigation the SEC is depriving OKC of due process. The fourth amendment complaint and the due process complaint concerning the investigation raise not insubstantial questions of constitutionl infringement and are matters over which this court has jurisdiction. OKC's fifth amendment allegation concerning use of the report, however, is precisely the sort of conclusory due process complaint against which, in *Coca-Cola Company* v. *Federal Trade Commission, supra,* the Fifth Circuit warned. In that case the plaintiff contended that if the court did no enjoin the FTC's proceedings, Coca-Cola would be forced to defend multiple lawsuits and would risk inconsistent decrees. Plaintiff argued that such a result would violate its due process rights. The court rejected Coca-Cola's position and emphasized that "the 'right' to be free from defending a multiplicity of lawsuits is not a statutory right, not a constitutional right and, in the context of the present case, not a right at all but an equitable principle." 475 F.2d at 304. Similarly, the attorney-client privilege, the root of OKC's due process claim, is not a principle of constitutional proportions but a rule of evidence. While unquestionably valued and significant, the attorney-client privilege has not been elevated to the stature of a constitutional right. It is a claim over which this court does not have jurisdiction.

Motions to Dismiss

A. *Monetary Damages*[1] *and the Fourth Amendment.*

The Supreme Court has firmly established that a citizen suffering injury from an invasion of his fourth amendment rights may obtain from the responsible federal official an award of monetary damages. *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971). The SEC contends, however, that its officials have absolute immunity from such liability, and relies for support on *Butz* v. *Economou,* —— U.S. ——, (1978). In that case the Supreme Court stated:

> '[The] officers of the government from the highest to the lowest are creatures of the law, and are bound to obey it' . . . We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunities specified in *Scheuer* [v. *Rhodes,* 416 U.S. 232 (1974)], subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business. *Id.*

The court held that the measure of an "exceptional" situation was the law of immunities which governs cases under 42 U.S.C. § 1983. Justice White stated that agency officials who perform functions analogous to those of prosecutors, who decide to initiate or continue adjudicatory proceedings are, like prosecutors, "entitled to absolute

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[1] Plaintiff alleges that it suffered damages in the amount of $15,000,000 but does not state which of the defendants' acts of which OKC complains caused this great loss. The court will inquire into whether the complaint can support a claim for monetary relief.

immunity from damages liability for their parts in that decision." *Id.* As it did in *Imbler* v. *Pachtman,* 424 U.S. 409, 430-31 (1976), the court left open the question of whether a prosecutor is absolutely immune for acts committed in his investigative capacity. —— U.S. —— n.37. (*Imbler* held prosecutors sued under § 1983 for damages arising from actions committed in their adversary rather than investigative role have absolute immunity.) Circuit courts have addressed this open issue, however, and have held that a prosecutor's absolute immunity does not extend to acts done while investigating. *Guerro* v. *Mulhearn,* 498 F.2d 1249, 1256 (1st Cir. 1974); *Hampton* v. *Chicago,* 484 F.2d 602, 608-09 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1973); *Robichaud* v. *Ronan,* 351 F.2d 533, 537 (9th Cir. 1965). *See, Madison* v. *Purdy,* 410 F.2d 99 (5th Cir. 1969); *Lewis* v. *Brautigam,* 227 F.2d 124 (5th Cir. 1955) [in which the Circuit held that a prosecutor cannot claim immunity for acts committed outside the scope of his jurisdiction and without authorization of law].

This appellate authority is persuasive. If SEC officials in their adversary capacity committed the acts of which plaintig complains and those acts violated the fourth amendment, then the immunity to whch they are entitled is absolute. If on the other hand they committed those acts in their investigative role, then they may claim qualified immunity. In the latter case, only if they acted in good faith can they escape liability.[2] Until this court determines in Phase II

[2] This law of qualified immunity places both OKC and the SEC in difficult positions. It puts OKC in the posture of arguing on the one hand that the SEC officials were functioning in their investigatory capacity and on the other that the SEC's investigatory procedures are actually adjudicatory. Conversely, the SEC must argue that its officials have been acting in their advocate's role, and yet that its proceedings are merely investigatory.

of this case whether the SEC's seeming investigatory proceedings are actually adjudicatory, the question of whether the officials are entitled to absolute or qualified immunity cannot be fully resolved. A finding that the inquiry is in fact an adjudication will mean that the individual defendants are entitled to absolute immunity for some of the acts they committed, but not all. There can be little question that until the officials decided to initiate the challenged proceedings, they were merely investigating OKC. As to these actions, the question of their good faith arises. Because the question is one of fact, it may not at this time be decided. Rather the parties need the opportunity for discovery.

B. *The Exclusionary Rule.*

The SEC argues that in asking this court to exclude the Locke, Purnell report from SEC proceedings, OKC has failed to state a claim on which relief may be granted. It contends that the exclusionary rule cannot be invoked in SEC investigative proceedings, and relies for support on *United States* v. *Janis,* 428 U.S. 433 (1976). In that case the Supreme Court refused to extend the exclusionary rule to a civil proceeding instituted by the federal government and to bar the use of evidence illegally seized by a state criminal law enforcement agency. The court reasoned that the application of the exclusionary rule to federal and state criminal proceedings provided adequate deterence, and that the societal costs of excluding concededly relevant evidence from civil cases outweighed whatever additional, marginal deterrence would result. Arguably, neither rationale applies here.

Justice Blackmun in *Janis* emphasized that the primary purpose of the exclusionary rule is " 'to deter future un-

lawful police conduct.'" *Id.*, 428 U.S. 446.[3] When the officer who commits the unconstitutional search or seizure has no responsibility or duty to, or agreement with the sovereign seeking to use the evidence, "the deterrent effect of the exclusion of relevant evidence is highly attenuated." *Id.* at 458. The desired deterrence can only result from excluding evidence from a case in which the officer is an agent of the sovereign seeking to use the evidence. *Id.* The court in *Janis* specifically observed that the facts of that case did not raise the question of such an intra-sovereign violation. *Id.* at 455-56, n.31. This case, however, appears to present precisely that circumstance. The individuals whom OKC accuses of violating its Fourth Amendment rights are all officers and employees of the SEC. Their duty is to the Commission alone. The SEC and no other sovereign is now seeking to use the report as evidence. Under *Janis,* therefore, the deterrent impact of applying the exclusionary rule to this report in these proceedings is in no way attenuated; its force is not incremental but primal.

The court in *Janis* emphasized that the existence of other more directly felt sanctions—specifically, the exclusion of the evidence from both state and federal criminal prosecutions—rendered the additional civil application of the rule unnecessary. Again, *Janis'* logic is inapposite to this case. If the defendants are able to use this report in the investigation, there is no certainty that any situation

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[3] "The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of law-enforcing officers.'" *Id.* at 454-55, n.29, quoting Amsterdam, *Search, Seizure a d Section 2255: A Comment,* 112 U.Pa.L.Rev. 378, 388-89 (1964).

will arise in which other deterrent sanctions will be imposed. First, after the investigation, the SEC might not initiate further proceedings in which the rule could apply. It may discover during the investigation either that no probable cause exists to justify an enforcement action, or that criminal proceedings, which the Commission is not empowered to prosecute are appropriate. Second, while it is true that the defendants may turn the report over to other governmental agencies or departments, including the Department of Justice,[4] the applicability of the exclusionary rule to proceedings initiated by such other entities is unresolved.[5]

The SEC also relies on *United States* v. *Calandra*, 414 U.S. 338 (1974). In that case the Supreme Court held that the exclusionary rule should not be extended to grand jury proceedings. It reasoned that the grand jury does not adjudicate but merely investigates to determine probable cause. Invocation of the exclusionary rule would impede the orderly progress of the grand jury investigation and result in preliminary trials on the merits. Analogizing grand jury proceedings to its own investigation, the SEC contends that the exclusionary rule has no place in its inquiry into possible OKC wrongdoing.

A motion to dismiss requires the court to look only at the face of the pleadings. The SEC misreads OKC's complaint. That complaint unequivocally alleges that the SEC's investigations are actually adjudications. The SEC does not and could not contend that *Calandra* applies to adjudications. Taking OKC's complaint as true, this court

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[4] We raise this possibility without deciding it.

[5] Indeed, the logic of *Janis* would indicate that the rule might not apply.

must find that OKC does state a valid claim. If in Phase II this court finds that the SEC's proceedings are investigatory rather than accustory, however, the SEC should resubmit as a Rule 56 motion its contention that OKC cannot invoke the exclusionary rule and the court will reconsider the applicability of *Calandra.*

C. *Monetary Damages and Due Process.*

OKC alleges that the SEC, by conducting an accusatory inquiry without procedural safeguards and by disclosing information to Pharaon's representatives, violated its fifth amendment due process rights. These complaints cannot support a claim for monetary relief. The Fifth Circuit sitting *en banc* recently ruled that no right of action for monetary damages may be implied from the due process clause of the fifth amendment. *Davis* v. *Passman,* 571 F.2d 793, 801 (5th Cir. 1978). Accordingly, to the extent that these claims seek monetary relief, they are dismissed.

D. *Section 14(e).*

OKC also claims that during their meeting with Pharaon's representatives, the individual defendants violated § 14(e) of the Securities Exchange Act. Section 3(c) of the Securities Exchange Act, 15 U.S.C § 78c(c), excepts from its reach officers or employees of the Commission acting in the course of their official duties. All of the individual defendants are officers and employees of the Commission who are being sued for actions taken in the course of their official duties. The mere fact that OKC alleges that these defendants violated the law does not remove them from the protection of § 3(c). OKC's claim under § 14(e) of the Securities Exchange Act is therefore dismissed for failure to state a claim.

E. *FOIA.*

OKC has alleged a violation of the FOIA, 5 U.S.C. § 552. That statute will not support a private right of action other than one against a federal agency. *See* 5 U.S.C. § 552(a)(4). Accordingly, under that Act OKC does not state a claim for money damages against the individual defendants. Thus, to the extent that OKC's FOIA claim is directed to the individual defendants, it is dismissed. This court cannot grant the SEC's motion to dismiss OKC's FOIA complaint against the agency, however. Whether the SEC timely complied with OKC's request for documents and whether these documents are exempted from disclosure are both disputed issues which cannot be resolved by examining the face of the pleadings. *See, e.g., Pacific Architects & Engineers, Inc.* v. *Renegotiation Board,* 164 U.S.App.D.C. 276, 278, 505 F.2d 383, 385 (1974). In Phase II of this proceeding, if either party believes summary judgment is appropriate on this point, each should submit whatever evidence and arguments it deems necessary.[6]

F. *The Privacy Act.*

OKC also alleges that the defendants violated the Privacy Act of 1974, 5 U.S.C. 552a, by providing information to and receiving information from the Department of Energy and other agencies, and by disclosing the existence of the OKC investigation to Pharaon. Because the Privacy Act does not grant protection to corporations, these allegations must be rejected as failing to state a claim upon which relief can be granted. An "individual" is defined by the Act as a

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[6] The FOIA only permits a court to award reasonable attorneys' fees or other litigation costs reasonably incurred. 5 U.S.C. § 552(a)(4)(E). Thus, OKC must find some other alleged violation to support its damage claim for $15,000,000.

"citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2). "This definition is intended to distinguish between the rights which are given citizens and individuals under this Act as opposed to the rights of proprietorships, businesses, and corporations which are not intended to be covered by the Act." Office of Management and Budget, Privacy Act Guidelines, 40 Federal Register, No. 132, p. 28951 (July 9, 1975). Similarly, in *Stone* v. *Export-Import Bank of the United States,* 552 F.2d 132 (5th Cir. 1977), *cert. denied,* 434 U.S. 1012 (1978), the Fifth Circuit noted that the Senate Report regarding the Privacy Act stated that the "term ['individual'] is used instead of the term 'person' throughout the bill in order to distinguish between the rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act." 552 F.2d at 137, n.7. Accordingly, OKC's Privacy Act complaint is dismissed for failing to state a claim upon which relief can be granted.

Motion to Strike

The SEC has filed a motion to strike OKC's claim arising out of the meeting between Commission personnel and the representatives of Ghaith R. Pharaon. Specifically, the SEC contends that paragraphs 15 and 16 of OKC's complaint are impertinent and scandalous. An impertinent pleading is one that is immaterial. *Mitchell* v. *American Tobacco Company,* 28 F.R.D. 315 (D.C.Pa.1961). Scandalous matters are those casting an excessively adverse light on the character of an individual or party. *Budget Dress Corporation* v. *International Ladies Garment Workers Union, AFL-CIO,* 25 F.R.D. 506, 508 (S.D.N.Y.1959). Mo-

tions to strike are disfavored and rarely granted. *Augustus* v. *Board of Public Instruction,* 306 F.2d 862 (5th Cir. 1962). Unless the matter of which the movant complains bears no possible relation to the controversy or may cause the objecting party prejudice, such motions should be denied. *Id.*

In determining whether a party's pleading is impertinent or scandalous, a court should view all well-pleaded facts in their most favorable light. *Budget Dress Corp.* v. *International Ladies Garment Workers Union, AFL-CIO, supra.* The SEC has not shown and indeed does not contend that OKC's pleadings concerning SEC's contact with Pharaon are on their face scandalous or impertinent or that they have caused any prejudice. When taken as true, the challenged paragraphs are certainly relevant to OKC's claims and do not contain the extreme sort of accusation that unnecessarily reflects adversely on the defendants. Instead, despite the general rule that in deciding motions to strike a court should not consider matters outside the pleadings, the SEC wants this court to look beyond the complaint. *Ciprari* v. *Servicos Aeros Cruzerio do sul,* 245 F.Supp. 819 (S.D. N.Y. 1965), *aff'd on other grounds,* 359 F.2d 855 (2nd Cir. 1966). *See,* Wright & Miller, *Federal Practice & Procedure* § 1380 (1966). Furthermore, a disputed fact question cannot be decided on a motion to strike. *Augustus* v. *Board of Public Instruction, supra,* at 868. The SEC nonetheless has submitted for this court's consideration various affidavits and letters. Acknowledging that the court halted all discovery in this action, the SEC criticizes OKC for not coming forward with any firsthand controverting information. Because this case has not yet progressed beyond the pleading stage, the fact issues that OKC raises in its complaint and that SEC contests in its memorandum, affidavits, and letters in support of this motion must be considered to be dis-

puted. The motion to strike therefore is denied. After the parties have completed discovery on this issue, however, the SEC is free to resubmit its arguments in the form of Rule 56 motion for summary judgment.

The Fourth Amendment: Summary Judgment

The SEC asserts that it is entitled to summary judgment on OKC's claim that in obtaining and using the Locke, Purnell report, the SEC violated OKC's fourth amendment rights. We reach this question only because we reserved the issues, *supra*, of whether OKC in seeking monetary damages and the application of exclusionary rule, states claims on which relief may be granted. If the SEC is correct, and there has been no constitutional violation, then this court need not later resolve those issues of remedy. In determining whether summary judgment is appropriate, this court must undertake a two-step analysis. First, it must establish whether there are any set of circumstances supporting plaintiff's complaint under which the SEC could have violated OKC's fourth amendment rights. If there are no such circumstances, then the SEC is entitled to summary judgment. If, however, the SEC could have violated the fourth amendment, the court must then decide whether the parties have presented facts sufficient to prove the SEC's actual role in the report's seizure.

The fourth amendment protects private citizens from unreasonable governmental searches and seizures. It does not shield persons from the intrusions of private parties. If a private individual turns a seized item over to a government entity whose officials have no connection with or knowledge of the seizure until after it occurs, then the fourth amendment has not been violated. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921); *United States* v. *Mekjian*, 505

F.2d 1320 (5th Cir. 1975). A federal official who actively participates in a private party search, or stands by watching it with approval and then reaps its benefits, however, implicates the federal government. Such conduct intrudes on the victim's fourth amendment rights. *Lustig* v. *United States,* 338 U.S. 74 (1949); *United States* v. *Mekjian, supra.* A private party search conducted under the active supervision of the governmental authority is equally unconstitutional. *United States* v. *Mekjian, supra.*

As governmental connection with the search becomes more attenuated, the precise point at which the fourth amendment violation occurs becomes increasingly difficult to determine. The Fifth Circuit in *United States* v. *Mekjian, supra,* established the point at which the government is unconstitutionally involved in a search. If a government official either knew or should have known at the time of its occurrence that a private party search was to be conducted, the government cannot accept its benefit. 505 F.2d at 1328. Thus under *Mekjian,* if any SEC official knew or should have known at the time of the seizure's occurrence that the informant was obtaining the Locke, Purnell report, then the SEC violated OKC's fourth amendment rights.

OKC relies on *Knoll Associates, Inc.* v. *Federal Trade Commission,* 397 F.2d 530 (7th Cir. 1968) to support its claim that even after-the-fact governmental approval of a private party search violates the Fourth Amendment. It thus overlooks the Fifth Circuit holding in *Mekjian* which is directly contrary to OKC's proffered distillate of *Knoll. Mekjian* specifically held that absent the government's actual or implicit knowledge of a seizure at the time that it was occurring and absent governmental encouragement and cooperation, the fourth amendment is not violated. 505 F.2d at 1328. Furthermore, although *Knoll* is less than

lucid on this point,[7] the Fifth Circuit has not read that case as broadly as OKC would like. Rather, in *Mekjian,* the court cited *Knoll* for the narrower proposition that if *at the time* a private party search and seizure occurs the governmental official knows of and consents to it either tacitly or explicitly, then even though the official removes himself from the scene of the search, the fourth amendment is violated. *Id.*

OKC urges that if the Locke, Purnell report is privileged, a more rigorous fourth amendment standard applies than is appropriate to those cases involving unprivileged materials. It relies on *Roaden* v. *Kentucky,* 413 U.S. 496 (1973), in which the Supreme Court held that a county sheriff's warrantless seizure of a sexually explicit film at a local drive-in theatre violated the fourth amendment, not because he could easily have obtained a warrant, but because his actions constituted a form of prior restraint on expression. Chief Justice Burger stated that an intrusion into first

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[7] In *Knoll,* Prosser, an employee of Knoll's sales representative, purloined from Knoll an incriminating document for the purpose of assisting the FTC in a proceeding against Knoll. At some point, Prosser telephoned the FTC and informed the agency that he had information that would "hang" Knoll. *Id.* at 532. The Seventh Circuit did not make clear, however, whether Prosser made this phone call before or after he seized the documents. Although there apparently was no evidence that the FTC participated in the theft or even requested that Prosser produce the document when it learned he possessed it, it was clear that when the FTC received the document, the agency knew that Prosser had stolen it. The court found that the FTC, "by its use of the documents knowingly gave its approval to Prosser's unlawful act," *id.* at 533, and thereby violated Knoll's fourth amendment rights. Recently the Seventh Circuit itself has limited *Knoll* significantly. *United States* v. *Marzano,* 537 F.2d 257, 271 (7th Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977); *United States* v. *Billingsley,* 440 F.2d 823, 826 (7th Cir.), *cert. denied,* 403 U.S. 909 (1971).

amendment rights calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression. *Id.* at 504. *Roaden* is arguably not limited to seizures which infringe on First Amendment rights; the court's language and rationale is more sweeping. Warning that the fourth amendment should not be read in a vacuum, the court stated:

> A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. *Id.* at 501.

Roaden teaches that in determining the reasonableness of the SEC's possession and use of the Locke, Purnell report, this court should consider the value of the attorney-client privilege. This privilege is premised on the judicial belief that if clients are encouraged to make full disclosures to their attorneys, the attorneys will be better able to advise and represent them. Such relationships will facilitate the proper administration of justice. "While it relates to the rights of an individual, [the privilege] is nonetheless recognized, as so many of our fundamental rights are, as essentially in the public interest." *SEC* v. *Harrison,* 80 F.Supp. 226, 230 (D.D.C.1948). The privilege is deemed to be so important that neither the SEC, *see, e. g., McMann* v. *SEC,* 87 F.2d 377, 378 (2nd Cir.), *cert. denied,* 301 U.S. 684 (1937); *SEC* v. *Harrison, supra,* nor the grand jury, *see e. g., In Re Grand Jury Subpoenas*

Served Upon Field, 408 F.Supp. 1169, 1172 (S.D.N.Y.1976), may intrude upon it.[8]

Because documents enjoying the attorney-client privilege have an intrinsic high expectation of privacy, arguably, a more rigorous fourth amendment standard ought to be applied to their seizures than to seizures of other materials. But we are not here deciding the reasonableness of the seizure; the question is the government's participation in the seizure. Here the heightened expectation of privacy expected in a report of legal counsel is relevant in judging the facts sufficient to implicate the government in its seizure. Before attempting a statement of that standard, however, we must explore two fact questions. First, we must establish the degree of the SEC's participation in and knowledge of the informant's actions. Second, we must determine whether the Locke, Purnell report is actually privileged.

The SEC has submitted affidavits supporting its assertion that a former OKC employee contacted the defendants Mathis and Simms, provided them with the report, and gave them no reason to believe it had been stolen. The affidavits further state that neither Mathis nor Simms had any prior knowledge of the report's existence or participated in any way in the informant's acquisition of the report. The SEC concludes that since the government played no role in ob-

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[8] It is unquestionable, however, that the privilege does impede the search for truth. Consequently, the trend has been toward its strict application. *See, e.g., United States* v. *Friedman*, 445 F.2d 1076, 1087 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); *Laughner* v. *United States*, 373 F.2d 326, 327 n.1 (5th Cir. 1967). Despite the drawbacks of protecting attorney-client communications, courts have long held that the benefits which spring from enforcing the privilege outweigh the harms and are essential to our system of justice.

taining the report, it did not violate OKC's fourth amendment rights.

Defendant misconceives the nature of summary judgment. This court with the concurrence of the SEC and OKC halted all discovery. Thus far, OKC has not had the opportunity to engage in discovery on this issue such as interrogating SEC officials who have knowledge of how the agency received the report. Under Rule 56(f), Fed. R. Civ. P., plaintiff is entitled to discovery in order to file responsive affidavits. Until the ordered discovery is complete, this court will not consider the SEC's motion. As to the privileged nature of the report, the SEC argues that because the relevant facts are exclusively within OKC's knowledge and because OKC has failed to produce affidavits establishing its privileged status, the SEC is entitled to summary judgment. But privilege is not a determinant but a factor in the fourth amendment analysis and the court will withhold that determination pending discovery.

Further Proceedings: Phase I

The parties may proceed with discovery on the following matters: the extent of the SEC's knowledge of and involvement in the private party seizure of that document; the closely related question of the individual defendants' good faith; and, if necessary, the report's privileged status. The SEC is entitled to assert the informer's privilege.[9] In so ruling, this court has balanced the public interest in protecting the flow of information and assistance to the

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[9] The informer's privilege is well recognized, *Mitchell* v. *Roma*, 265 F.2d 633, 635 (3rd Cir. 1959); *see*, *Roviaro* v. *United States*, 353 U.S. 53 (1967), and is applicable to civil proceedings. *Westinghouse Electric Corp.* v. *Burlington*, 122 U.S.App.D.C. 65, 72-73, 351 F.2d 762, 769-70 (1965).

SEC against OKC's need for this discovery in the preparation of its case. *Roviaro* v. *United States,* 353 U.S. 53 (1957). Thus, in the course of discovery, OKC should not inquire into the identity of the informant(s) or seek to obtain his deposition. At the same time, because of the unique factual posture of the case, the informant(s) ought not go unexamined. The court has struck a balance between the strong competing interests and orders SEC counsel to examine the informant(s) in chambers with only court personnel, informant, and SEC counsel present. That testimony will be filed and sealed, and will be available only to the court. After all Phase I discovery has been completed, the court will examine all affidavits and depositions, including the sealed statements of the informant(s) to determine whether disclosure of the informant's identity is required. It will then before January 19, 1979, issue further orders either granting summary judgment or requiring certain additional discovery.

All Phase I discovery [and the *in camera* examination of the informant(s)] must be completed before December 31, 1978. The parties will cooperate to meet this deadline by agreeing to proceed with short notices and by agreement. The only present restraint now imposed upon the SEC is that it can make no use of the Locke, Purnell report pending completion of the ordered discovery. Should it develop that there is no fact question with regard to the SEC's contention as to how it obtained the report, this restraint will be lifted and discovery may proceed. The SEC investigation may then proceed with use of the report absent any further preliminary injunctive relief.

Summary

This court has granted defendant's motion to dismiss for lack of jurisdiction OKC's claim that in obtaining and using the report, the SEC is violating OKC's fifth amendment due process rights, but has found that it has jurisdiction over plaintiff's remaining claims.

The court has dismissed for failure to state a claim the following OKC claims:

1. That the SEC's investigation violates OKC's fifth amendment due process rights to the extent that OKC seeks monetary damages;

2. Its complaint under the Privacy Act;

3. Its FOIA complaint to the extent that it claims monetary damages from the individual defendants; and

4. Its complaint that the defendants violated § 14(e) of the Securities Exchange Act.

It has denied the SEC's motion to strike certain of OKC's pleadings. Finally, pending ordered discovery, the court has deferred ruling on the SEC's motions for dismissal or in the alternative for summary judgment on OKC's fourth amendment and remaining fifth amendment claims, and its FOIA claim to the extent that it seeks relief other than monetary damages from the individual defendants.

PATRICK E. HIGGENBOTHAM
United States District Judge

November 22, 1978

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. CA-3-78-1021-G

OKC CORP.,

Plaintiff,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants.

OPINION

This court's order of November 22, 1978 stated that if the SEC were sufficiently implicated in a private party taking of the Locke, Purnell report from OKC, then the agency would be found to have violated OKC's Fourth

Amendment rights. Today we hold that because there was in fact no private party taking and OKC has failed to show a genuine issue of fact with regard to the involvement of the SEC in any "taking," no unconstitutional seizure of the report occurred.

I.

The Claimed Private Taking

The crucial facts are undisputed. At OKC's board of directors meeting on November 1, 1977, the decision was made to distribute copies of the report to all board members. A member of the board, Gary Adams, received his copy of the report in the mail a few days later. No cover letter instructing Adams as to any limitation on his use of the document accompanied it. Adams turned the report over to Wade, an OKC employee. A copy of this report was made and voluntarily exchanged among Wade, David Ownby, and Tom Patrick. Ownby and Patrick later delivered it to the Commission.

The Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Hoffa* v. *United States,* 385 U.S. 293, 302 (1966); *see United States* v. *White,* 401 U.S. 745 (1971); *Alderman* v. *United States,* 394 U.S. 165 at 179, n.11 (1969); *Mendoza* v. *United States,* 473 F.2d 692 (5th Cir. 1972). In *Hoffa,* Partin, a government informer, testified to conversations which occurred in the defendant's hotel room and which were either directed at the informer or conducted knowingly in his presence. The court held that there had been no unconstitutional seizure. Similarly in *Lopez* v. *United States,* 373 U.S. 427 (1963), the court held that evidence obtained by a recording

device hidden on the person of an informant was admissible. The court stated, "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Id.* at 465. *See On Lee* v. *United States,* 343 U.S. 747 (1952).

While it is true that the above cases involved the revelation of conversations, the Fifth Circuit had determined that "no meaningful distinction can be drawn between betrayal by relating the substance of a conversation" and betrayal by search or seizure of a tangible object. In *Mendoza* v. *United States, supra,* participants in a narcotics conspiracy entrusted a government informer whom they believed to be a member of the conspiracy with possession of an automobile for the purpose of constructing in it a secret compartment for further drug smuggling. The informer permitted government agents to search the car. Explicitly refusing to distinguish between that situation and the ones presented in *Hoffa, White* and *Alderman, supra,* the Circuit observed that "the risk of being betrayed by an informer is one of those risks that conspirators necessarily assume." *Id.* at 695.

The instant case is indistinguishable from this line of authority. Adams rightfully possessed the report. When he handed it over to Wade, he (and OKC) took the risk that Wade or whomever Wade chose to show it to would reveal not only the contents of the report but also the report itself to the government. That other members of the board did not intend for Wade to have possession of the report is irrelevant. They took the risk that one of their associates would let the rest down.

Contending that Adams gave the report to Wade for the limited purpose of performing a tax analysis, OKC argues that a finding of no private party taking would also allow a corporation's file clerk, at the government's behest, to hand over to the government confidential documents under his control. This court's decision does not sweep so broadly. It must be read against the established law of custodial possession. If a property owner gives mere custodial possession of property to another, and that person, at the urging of government officials, turns the property over to them, there may well be a seizure in the sense of the Fourth Amendment. *United States* v. *Pryba,* 502 F.2d 391 (D.C. Cir. 1974); *see United States* v. *de la Fuente,* 548 F.2d 528 (5th Cir. 1977); *Barnes* v. *United States,* 373 F.2d 517 (5th Cir. 1967). Even if Adams did give the report to Wade for a tax analysis only, Wade's possession and control was much more than that of a custodian. It was more closely analogous to that of the informer in *Mendoza.* Although that informer was given the automobile for a limited purpose—that of constructing a secret compartment—his authority over the automobile was greater than that of a custodian.

This court recognizes that the corporate entity here possesses unique legal problems. Under the Fourth Amendment, however, the rule that a taking (at the behest of the government) by one in mere custodial possession amounts to a private party seizure sufficiently protects a corporation's reasonable expectation of privacy. Although Adams or another corporate executive might have a subjective expectation that an associate with whom he entrusts corporate information will not disclose it, this expectation is not sufficient to bring the Fourth Amendment into play. His expectation must also be objectively reasonable. If an ex-

ecutive reveals the contents of documents or communicates ideas to his associate whether for the associate's edification or for his performance of a specialized task, for purposes of the Fourth Amendment he runs the risk that the associate may reveal the matter entrusted to him. Simply stated, "the Fourth Amendment does not protect against unreliable (or law-abiding) associates." *Katz* v. *United States,* 389 U.S. 347, 363 (White, J. concurring). There was, therefore, no private party taking.

II

No SEC Entreaty to Obtain the Report

The SEC has sworn that the "taking" of the report was without its knowledge and was not at its urging or request. OKC has not in response produced evidence sufficient to create a fact question as to SEC participation or as to a plausible link between the Department of Energy, which arguably had prior knowledge, and the SEC.[1]

Alternatively, if the SEC had been aware of the report and had requested Ownby and Patrick obtain a copy of it, OKC's Fourth Amendment rights would not have been violated because the report was not improperly seized.

The SEC's motion for summary judgment on Phase I of this case is GRANTED.

PATRICK E. HIGGENBOTHAM
United States District Judge

February 3, 1979

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. CA-3-78-1021-G

OKC CORP.,

Plaintiff,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants.

ORDER

The court has elected to treat the application for a stay pending appeal as a motion for reconsideration of the court's order of February 7, 1978 and its order granting summary judgment. Pending reconsideration of those

orders, the SEC and other named defendants will make no use of the Special Committee Report. The SEC will within five (5) days reply to the brief filed February 7, 1979.

So that any rights to appeal will not be effected, the court will stay its two orders. OKC complains that it has not had an opportunity to brief the "new issues". The court wishes to give it every opportunity to do so. That is the purpose of this order.

PATRICK E. HIGGENBOTHAM
United States District Judge

February 7, 1979

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

No. CA-3-78-1021-G

OKC CORP.,

Plaintiff,

—against—

HAROLD M. WILLIAMS, JOHN R. EVANS, PHILIP A. LOOMIS, JR., IRVING M. POLLACK, and ROBERTA S. KARMEL, Individually and as Commissioners of the United States Securities and Exchange Commission; RICHARD M. HEWITT, CECIL S. MATHIS, WAYNE M. WHITAKER, BENJAMIN F. SIMMS, JR., KATHLEEN N. STEWART, THEODORE A. LEVINE, EDWARD D. HERLIHY, STEVEN K. MCGINNIS, and DAVID A. WATSON, Individually and as Officers and Employees of the United States Securities and Exchange Commission; and the UNITED STATES SECURITIES AND EXCHANGE COMMISSION, an agency of the United States of America,

Defendants.

OPINION

After reconsidering its ruling of February 2, 1979 granting the SEC's motion for summary judgment, this court is of the opinion that its holding that a corporate employee having more than mere custodial possession of a document

may voluntarily hand it over to the government without running afoul of the fourth amendment may sweep too broadly. The expectation of privacy in the information imparted to the SEC, *when* imparted to it was not high and arguably not objectively reasonable. And it is doubtful that consent to search analysis ought to be applied to this delivery of information. Regardless, the resolution of this difficult constitutional issue is unnecessary to the disposition of this case. The teaching of *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341 (1936) (J. Brandeis) is that prudence requires avoidance of such difficult questions ". . . unless obliged to do so in the proper performance of our judicial function. . . ." *Id.* 341.

This court granted the SEC's motion on two other and independent grounds. It found not only that there was no private party seizure of the Locke, Purnell report, but also that no genuine issues of material fact existed as to the SEC's participation in the obtaining of the report or as to a plausible link between the DOE and the SEC. The court remains persuaded that its latter position is sound. The record does not support OKC's suggestion that the SEC's involvement is somehow linked to a 1977 SEC-DOE joint task force which studied DOE law enforcement methods. Theodore Levine, an SEC representative on that task force, learned in the course of the study about several DOE investigations including the DOE investigation of OKC. Levine has testified, however, that his knowledge of OKC's alleged illegal conduct was limited to oil pricing practices that may have violated DOE regulations. Larry W. White, formerly at the DOE and a member of the task force, confirmed Levine's testimony. White also stated that it was not the DOE's practice to inform other government agencies of possible illegalities not under the DOE's juris-

diction. Finally, he testified that he has no recollection of members of the task force mentioning a relationship between enforcing the energy and securities laws.

OKC's efforts to concoct a fact question out of evidence that the DOE made copies of the Locke, Purnell report also must fail. OKC contends that "the copies were made with everyone's knowledge for delivery to the SEC" and that the DOE "arranged for a copy to be delivered to the SEC." The testimony of Harold Clements (the DOE official who made and delivered the copies to Wade), of Wade, and of Ownby indicates that the DOE was unaware that one of the copies it made might later be delivered to the commission. Because there are no fact questions about an SEC-DOE link, the manner in which the DOE itself obtained the report is irrelevant.

Regardless of whether there was a private party seizure of the report, OKC has raised no fact question as to the SEC's prior connection with, knowledge of, or participation in that seizure. *Burdeau* v. *McDowell,* 256 U.S. 465 (1921); *United States* v. *Mekjian,* 505 F.2d 1320 (5th Cir. 1975).

This court has carefully reviewed the voluminous materials submitted. It is convinced that there is no ". . . *genuine* issue as to any *material fact*. . . ." Rule 56 F.R.C.P. (emphasis supplied.) Summary judgment ought to be used sparingly in claims laced with constitutional overtones. But the standard ought not be one of "slightest doubt." *See Beal* v. *Lindsay,* 468 F.2d 287, 291 (2d Cir. 1972). The plain language of the rule is genuine issue and to require a movant to show more than the absence of a "genuine" issue is to impose judicial gloss upon the rule. Out of concern for the seriousness of the allegations leveled by OKC, the court effectively stopped an SEC investigation for over

six months. After an enormous effort by OKC, including the taking of testimony from virtually any person in government in any manner connected to these facts, OKC's allegations now stand on a claimed link between the SEC and the DOE that tainted the delivery of the report to the SEC. The "issue," despite a mighty effort by resourceful counsel, leaves me firmly convinced that only concocted, not genuine, issues of fact remain. If Rule 56 is to have any meaningful role in complex cases, the courts must be sensitive to sifting the real from the fanciful.

Partial summary judgment therefore is granted. OKC's motion for stay pending appeal is denied. *See Midwest Growers Cooperative Corp.* v. *Kirkimo,* 533 F.2d 455, 465 (9th Cir. 1976).

PATRICK E. HIGGENBOTHAM
United States District Judge

February 22, 1979

APPENDIX "C"

JUDGMENT TO BE REVIEWED

C-2

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 79-1459, 79-1580

D. C. Docket No. CA-3-78-1021-G

OKC CORPORATION,

Plaintiff-Appellant,

versus

HAROLD M. WILLIAMS, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

Before GODBOLD, HILL and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 19, 1980

ISSUED AS MANDATE: JUNE 11, 1980

Certificate of Service

The undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that on this day three copies of the foregoing Petition have been served upon:

Julie Allecta, Esq.
Securities & Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

and

Solicitor General
Department of Justice
Washington, D.C. 20530

by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record at their post office addresses as shown above. I further certify that all parties required to be served have been served.

Dated: August 22, 1980

.....

JOHN J. WITMEYER III

No. 80-281

Supreme Court, U. S.
FILED
OCT 2 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

OKC CORP., PETITIONER

v.

HAROLD M. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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HAROLD M. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the examination by the Securities and Exchange Commission of the contents of a report prepared for corporate purposes violated the corporation's Fourth Amendment rights, where private parties had thoroughly reviewed the report before voluntarily deciding to turn it over to the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A7) is reported at 614 F. 2d 58. The order denying rehearing (Pet. App. A8-A10) is reported at 617 F. 2d 1207. The February 22, 1979, opinion of the district court granting partial summary judgment in favor of respondents (Pet. App. B39-B44) is not officially reported; it is unofficially published at [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 96,790. Four other opinions of the district court are included in the appendix to the petition; one of these opinions (Pet. App. B8-B33) is reported at 461 F. Supp. 540; another (Pet. App. B34-B38) is unofficially published at [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 96,773.

JURISDICTION

The judgment of the court of appeals (Pet. App. C2) was entered on March 19, 1980. A petition for rehearing was denied on May 30, 1980 (Pet. App. A8-A10). The petition for a writ of certiorari was filed on August 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, OKC Corp. ("OKC"), was, until recently, the subject of an investigation by the Securities and Exchange Commission ("Commission") for possible violations of the federal securities laws.[1] On August 15, 1978, OKC filed this action in the United States District

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[1]The Commission concluded its investigation of OKC and, on September 15, 1980, filed an injunctive action against the company and its chief executive officer, Cloyce K. Box, alleging violations of the antifraud, proxy and reporting provisions of the federal securities laws uncovered by the Commission in its investigation. *SEC* v. *Cloyce K. Box & OKC Corp.*, CA3-78-1217-D (N.D. Tex.).

Court for the Northern District of Texas against the Commission, its five members, and nine of its employees, seeking an injunction against the Commission's investigation and $15 million in damages (Pet. App. B10-B12). OKC alleged that Commission officials, acting either alone or in concert with officials of the United States Department of Energy, illegally obtained a copy of a report, prepared by an outside law firm for a special committee of OKC's board of directors, detailing various questionable business transactions and management practices engaged in by OKC (*id.* at B8-B9, B10, B42-B43). OKC contended that this document, which formed the initial basis for the Commission's inquiry, was stolen from its corporate files by several of its employees, and that the Commission, by allegedly instigating or otherwise participating in the taking of the report, violated OKC's Fourth Amendment rights.

After extensive discovery on the issue of the Commission's knowledge of and involvement in the alleged theft of the report, the district court found the pertinent facts to be "undisputed" (Pet. App. B35):

> At OKC's board of directors meeting on November 1, 1977, the decision was made to distribute copies of the report to all board members. A member of the board, Gary Adams, received his copy of the report in the mail a few days later. No cover letter instructing Adams as to any limitation on his use of the document accompanied it. Adams turned the report over to Wade, an OKC employee. A copy of this report was made and voluntarily exchanged among Wade, David Ownby [a former OKC employee] and Tom Patrick [an OKC employee]. Ownby and Patrick later delivered it to the Commission.

Based upon the record, which included "testimony from virtually any person in government in any manner connected to these facts" (Pet. App. B44), the district court concluded that there was no genuine issue as to the fact that Commission staff members had no involvement in any alleged "private party taking" of the report, either directly or through the Department of Energy.[2] Since there was no evidence that the Commission had any "prior connection with, knowledge of, or participation in" the alleged private party seizure, the district court, citing *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), granted partial summary judgment for respondents limited to OKC's Fourth Amendment claim (Pet. App. B43-B44).

The court of appeals affirmed (Pet. App. A2-A7). It "agree[d] with the district court that there were no genuine issues of disputed fact concerning SEC participation in the alleged private party taking, either directly or by linkage with DOE" (*id.* at A6).

ARGUMENT

1. In the courts below petitioner principally claimed that the Commission had been implicated in the private party taking of the report and that the seizure therefore violated its rights under the Fourth Amendment. Both courts rejected this claim on the ground that the evidence showed that the Commission did not participate either directly or indirectly in the alleged private party taking, and petitioner does not contest the courts' conclusions on this point.

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[2]The district court found that there had been no theft of the report at all (Pet. App. B34-B38), but concluded that this finding was unnecessary to support its ruling that there was no factual issue as to the legality of the Commission's actions (*id.* at B41-B44).

Instead, relying on *Walter* v. *United States*, No. 79-67 (June 20, 1980), petitioner now contends (Pet. 8) that the warrantless inspection of the report by Commission employees violated OKC's Fourth Amendment rights. Because this contention was not addressed by the courts below, however, there is no merit to petitioner's claim that the court of appeals' decision conflicts with this Court's judgment in *Walter*.[3]

In any event, petitioner's reliance on *Walter* is misplaced. In *Walter*, a private party gave FBI agents certain film containers that, from their exterior packaging, appeared to contain obscene pictures. The private party from whom the FBI obtained the film containers had not viewed the films. The FBI, without first obtaining a search warrant, viewed the films with a projector and found them to contain obscene material; the films formed the basis for the defendants' prosecution and conviction for violations of federal obscenity laws. This Court reversed the convictions in three separate opinions, none of which commanded a majority vote.[4]

The Court first reaffirmed the principle established in *Burdeau* v. *McDowell*, *supra*, that "a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use

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[3]Petitioner has recently moved in the district court for vacation of the partial summary judgment, pursuant to Fed. R. Civ. P. 54(b) and 83. In that motion petitioner has argued that the examination of the report by Commission officials without obtaining a warrant violated the Fourth Amendment. In these circumstances, petitioner should pursue its claim for relief in the lower courts before seeking review of this issue in this Court.

[4]Mr. Justice Marshall concurred in the judgment without opinion.

evidence that it has acquired lawfully." *Walter* v. *United States, supra,* slip op. 6 (opinion of Stevens, J.). See also *id.* at 2 (White, J., concurring); *id.* at 1 (Blackmun, J., dissenting). In his opinion announcing the judgment of the Court, Mr. Justice Stevens remarked (slip op. 6) that "there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties." However, because the private party in *Walter* had not actually viewed the films, Mr. Justice Stevens concluded that the projection of the films by the FBI agents "was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search" (slip op. 7), and that the separate search, which was not supported by a warrant or justified by one of the exceptions to the warrant requirement, infringed the defendants' legitimate expectations of privacy, in violation of the Fourth Amendment. Mr. Justice Stevens found it unnecessary to decide whether the government would have been required to obtain a warrant had the private party first viewed the films. Slip op. 7 n.9.[5] In his concurring opinion, Mr. Justice White concluded (slip op. 3) that "the Government's subsequent screening of the films constituted an independent, governmental search that would have infringed [the defendants'] Fourth Amendment interests without regard to any previous screening by private parties." The four dissenting Justices concluded that, under the peculiar facts presented, the government's screening of the films did not intrude upon the defendants' legitimate expectations of privacy. The

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[5]Mr. Justice Stevens noted, however, that a third party's inspection of papers or books could be so complete that there would be no additional search by the government when it reexamines the materials. Slip op. 9 n.14.

dissenters also disagreed with Mr. Justice White's conclusion that a third party's screening of the films would not have destroyed the defendants' privacy interests in them. *Id.* at 3 n.2 (Blackmun, J., dissenting).

In this case, unlike in *Walter*, the record establishes that petitioner had no remaining privacy interest in the contents of the report at the time the report was delivered to the Commission. The report had been disseminated to and read by individuals inside and outside the corporation. In addition, the private parties who obtained the report and delivered it to the Commission had thoroughly read the report, reviewed and discussed its contents, and decided on their own that it described possible securities laws violations.[6] Assuming that petitioner had a legitimate expectation of privacy in the report, that expectation was frustrated in its entirety by the private parties' inspection. Since the scope of the Commission's examination of the report was no greater than that of the private parties, there is nothing in this Court's disposition of *Walter* that suggests that

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[6]See, *e.g.*, Deposition of David Ownby, January 10, 1979, at 58-70, 71-73; Deposition of Tom Patrick, January 12, 1979, at 76-77; *in camera* testimony of Patrick and Ownby on December 16, 1978, at 4-7, 92; Deposition of Bill Wade, January 4, 1979, at 57-58 (Vol. I), January 12, 1979, at 130-133 (Vol. II).

Moreover, it is clear from the testimony of Ownby and Patrick, the two individuals who delivered the report to the Commission, that the Commission could have obtained information indicating possible securities laws violations from these individuals' own statements based on their personal knowledge. See, *e.g.*, *in camera* testimony, *supra*, at 13, 30-31; see also Deposition of Wade, January 12, 1979, *supra*, at 120-121 (Vol. II).

petitioner's Fourth Amendment rights were violated by the Commission's actions here.[7]

2. Petitioner also contends (Pet. 8-11) that any use of the report by the Commission is impermissible because the report is privileged matter. This contention is premature.[8] In one of its interlocutory orders the district court expressed the view that the privileged nature of a document could bear upon the reasonableness of its seizure under the Fourth Amendment (Pet. App. B28-B31). But the district court noted that it was not "deciding the reasonableness of the seizure; the question is the government's participation in the seizure" (*id.* at B30). Having subsequently found no governmental participation in any seizure, the district court found it unnecessary to consider the issue of privilege. The court of appeals, in denying rehearing, emphasized that the claim of privilege was not presented in OKC's appeal from the partial summary judgment (Pet. App. A10). Accordingly, the issue is not properly presented to this Court.

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[7]Moreover, even if the Commission's perusal of the report violated the Fourth Amendment, petitioner would, in any event, not be entitled to invoke the exclusionary rule to bar the Commission's use of the report during the investigatory proceeding. See *United States* v. *Calandra,* 414 U.S. 338, 349-352 (1974).

[8]The Commission does not concede that the report is, or ever was, protected by any privilege (Pet. App. B13-B14). We note that this case does not involve any issue as to whether the Commission may subpoena privileged material. *Reisman* v. *Caplin,* 375 U.S. 440, 445 (1964). Nor is there any issue as to whether the Commission may use privileged material as evidence against petitioner in an adjudicatory proceeding. Petitioner is, of course, free to raise any issue of privilege in the injunctive action now pending before the district court. See note 1, *supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1980

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